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SERVED JANUARY 24, 2008

UNITED STATES DEPARTMENT OF TRANSPORTATION
OFFICE OF HEARINGS
WASHINGTON, D.C.

2008 JAN 29 P 1:08

FEDERAL AVIATION ADMINISTRATION,

Complainant,

v.

WILLIAM GINTZ,

Respondent.

FAA DOCKET NO. CP06GL0010

(Civil Penalty Action)

DMS No. FAA-2006-26333

FEDERAL AVIATION ADMINISTRATION,

Complainant,

v.

CORRINE GINTZ,

Respondent.

FAA DOCKET NO. CP06GL0011

(Civil Penalty Action)

DMS No. FAA-2006-26334

INITIAL DECISION
OF ADMINISTRATIVE LAW JUDGE RICHARD C. GOODWIN

Found: Respondent William Gintz is assessed a civil penalty of \$350.00.
Respondent Corrine Gintz is assessed a civil penalty of \$100.00.

I. Background

Respondents William Gintz and Corrine Gintz, husband and wife, along with their three preschool sons, were passengers traveling from Los Angeles ("LAX") to the Twin

Cities of Minneapolis-St. Paul ("MSP") aboard Northwest Airlines ("NWA") Flight 310 on the evening of February 26, 2006. The Gintz' sons Luke and John sat in assigned seats, while the youngest child, Mark, an infant not required to be in a seat, was held by his mother.

The charges brought by Complainant Federal Aviation Administration ("Complainant," "FAA," or "agency") separately against Mr. and Mrs. Gintz, respectively, stem from their conduct on that flight. Respondents each are charged with a violation of section 121.317(k) of the Federal Aviation Regulations (FARs), while William Gintz also is charged with a violation of §121.580. Section 121.317(k) compels every passenger to comply with crewmember instructions regarding, among other things, the requirement to fasten safety belts and keep them fastened while the aircraft's "Fasten Seat Belt" sign is illuminated. Section 121.580 forbids any person from intimidating or interfering with a crewmember in the performance of the crewmember's duties aboard an operating aircraft.

The matters were consolidated since they arose from the same circumstances. The agency seeks a civil penalty assessment of \$3,000 against Mr. Gintz (Docket No. CP06GL0010) and \$1,000 against Mrs. Gintz (Docket No. CP06GL0011). The agency argues that Respondents' behavior justifies the respective amounts. Respondents counter that their behavior was reasonable, or at least excusable. They each argue that their respective conduct warrants no penalty.

Respondents also jointly filed a motion to dismiss. The motion argues for dismissal because 1) the penalties requested by the Complainant violate the Civil Penalty Assessment Act and thus are unconstitutional and unenforceable, and 2) in Docket CP06GL0010, the agency assured Mr. Gintz that its investigation into his behavior aboard the flight had been closed without further action (Tr. 10-13). Complainant opposes the motion (Tr. 13-15).

I held a hearing on October 4, 2007, in St. Paul, MN. The parties made closing statements and waived closing briefs (Tr. 292-314). The cases are ready for decision.¹ For the agency to prevail, it must establish proof of the violations alleged by a preponderance of the reliable, probative, and substantial evidence (14 C.F.R. §§13.223 and 13.224; *Toyota Motor Sales*, FAA Order No. 94-28, pp. 6-7, 1994 FAA Lexis 275, p. 10 (September 30, 1994)).

¹ I held the record open pending further pleadings or documents filed on or before January 4, 2008. Tr. 151-53. Since no filings were received by January 4, the record closed as of that date.

II. Respondents' Motion to Dismiss is Denied

A. The Claim that the Penalties Requested Violate the Civil Penalty Assessment Act is Rejected.

Respondents contend that the civil penalties requested by Complainant pursuant to the agency's Sanction Guidance Table then in effect, FAA Order 2150.3A, violate the Civil Penalty Assessment Act of 1992 and therefore are unconstitutional and unenforceable. They argue that while the tables contained in Order 2150.3A are meant to be used merely as guidance for the Complainant in proposing an appropriate sanction, the presiding officer in fact is "forced to defer" to these tables in selecting the sanction (Respondents' Pre-Trial Motion to Dismiss, p. 8). From this premise they contend that the penalties contained in Order 2150.3A are unconstitutional and unenforceable because they fail to conform to the terms of the Civil Penalty Assessment Act.

Respondents' premise is incorrect. The administrative law judge (ALJ), while bound by agency policy and goals, is not compelled to conform his decision to the civil penalty amount suggested by Order 2150.3A's tables or recommended by regional counsel. ALJs make decisions independently. Their independence is codified in the agency's own Rules of Practice in FAA Civil Penalty Actions, 14 C.F.R. §13.201 *et seq.* ("Rules"). The Rules authorize ALJs to "make findings of fact and conclusions of law" (14 C.F.R. §13.205(a)(9)). ALJs also are specifically granted the power to determine if a civil penalty is warranted, and, if so, to assess a penalty that the ALJ -- in his sole discretion -- deems "appropriate" (§13.232(d)). The ALJ may consult the Sanction Guidance Table, but only the ALJ determines whether a civil penalty is to be assessed, and if so, in what amount.

The Administrator has confirmed the ALJ's sole authority to determine appropriate civil penalties, independent of the Sanction Guidance Table. The Administrator has stated expressly that ALJs are not beholden to Order 2150.3A (*Northwest Airlines, Inc.*, Order 90-37 (November 7, 1990), p. 8).

For these reasons, I find Respondents' contention irrelevant and it is denied.

B. The Claim that Dismissal of the Action against William Gintz is Required in View of an FAA Statement that the Case had been Closed also is Rejected.

On April 12, 2006, William Gintz received a letter from an FAA office stating that the agency's investigation of the circumstances of the February 26, 2006 flight "did not establish a violation" of the FARs, and that he could "consider the matter closed" as to him (Exh. R-A; Tr. 11-13, 112). The following day, April 13, 2006, Corrine Gintz received a letter from the FAA indicating that the agency would be reviewing allegations pertaining to her. A week or two later, William Gintz received a letter from the FAA

stating that the agency was referring his case for further review. Respondents each received Notices of Proposed Civil Penalty on August 22, 2006.

Complainant acknowledges that the first, April 12 letter to Mr. Gintz was sent in its name, but states that it was a mistake, an errant input (Tr. 13, 99-102). Respondents contend that the circumstances described require dismissal of the Complaint against Mr. Gintz (Respondents' Pre-Trial Motion to Dismiss, p. 6). Their argument amounts to a claim of estoppel. This claim must fail.

An estoppel claim against a governmental entity must arise from particularly egregious circumstances in order to succeed. The government is in a different position from a private actor. An estoppel against the government would compromise the wide prosecutorial discretion invested by Congress in governmental agencies such as the FAA. It would undermine the policies behind the law.

The policies the FAA is charged with upholding and advancing -- chiefly the maintenance of safety and security in air transportation -- make a successful estoppel claim against it especially difficult. The FAA's sister agency, the National Transportation Safety Board ("NTSB"), in fact has held unequivocally that estoppel will *never* lie where the public interest in flight safety is implicated (*Ronald G. Fisher*, EA-2986, 6 NTSB 1292, 1294 (1989), *aff'd sub nom. Fisher v. Department of Transportation*, 917 F.2d 27 (9 Cir. 1990)).

While DOT has not precluded the possibility of a litigant prevailing on an estoppel claim, such a claim nonetheless must scale a high wall to succeed. To prevail the claimant must show "affirmative misconduct" by governmental officials (*Siu de Puerto Rico, Caribe Y Latino America v. Virgin Islands Port Authority*, 42 F.3d 801, 803 (3 Cir. 1994); *Corniel-Rodriguez v. Immigration and Naturalization Service*, 532 F.2d 301 (2d Cir. 1976)). A mistake or neglect by such officials will fall short of success (*Simon v. Califano*, 593 F.2d 121 (9 Cir. 1979); *see also Delaware Skyways, LLC*, FAA Order No. 2005-5 (March 10, 2005), p. 6). While the circumstances of the FAA-generated letters understandably confused the Gintzes (*see* Tr. 11) and are certainly unfortunate, the evidence shows that they resulted from a mistake, and no more. The circumstances, then, do not warrant dismissal of the Complaint.

Mr. Gintz has failed to make out the elements of a successful estoppel claim in any event. In order to prevail on such a claim, a party must show, among other things, that it has relied on the purported misrepresentation to its detriment (*Heckler v. Community Health Services*, 467 U.S. 51, 59 (1984)). Mr. Gintz has made no such showing. He has not even alleged, much less demonstrated, that he changed his position for the worse through reliance on the April 12, 2006 letter. For these reasons I find that Mr. Gintz has failed to make out an estoppel.

I have considered all other arguments advanced by Respondents in support of the motion and reject them without comment.

Respondents' motion for dismissal of the Complaint is denied.

III. Findings and Conclusions

A. Events

Testimony about the situation which resulted in the filing of these charges was presented by three flight attendants: Richard Silva, the attendant who dealt with Mr. and Mrs. Gintz; Alan Cooper, the lead, or "A", attendant; and Debra Nevinski, the flight attendant in the aft galley position. Testimony also was offered by John Livesey, an FAA cabin inspector; David and Sally Winter, a married couple who occupied seats near Respondents; and William and Corrine Gintz.

Mr. Silva set the scene. Flight 310 was a late evening flight. It was full, or nearly so. During liftoff, Mr. Silva noticed the Gintz' middle son Luke, who was about two and a half years old, standing on his seat and looking aft (Tr. 43-44, 162, 241). The "Fasten Seat Belt" light was illuminated (Tr. 62).

Mr. Silva left his jump seat in the rear and walked forward to row 18, where the boy was. He asked Corrine Gintz, who was seated immediately to Luke's left in seat 18E, which is the middle seat, aircraft right (Tr. 60, 258), to fasten Luke's seat belt. Mrs. Gintz made a brief attempt but did not succeed. It proved too difficult for her while holding her infant son, Mark.² Silva, realizing that the man sitting directly in front of Mrs. Gintz was her husband, gained his attention and asked if Mr. Gintz could assist his family. Mr. Gintz was busy trying to set up a DVD player for one of his children. He shot Silva "a look of intimidation," according to the flight attendant. Silva reminded Mr. Gintz that Luke needed to be secured. He then returned to his seat. The aircraft was still on its initial climb-out, and there was some light turbulence. Safety standards compelled Mr. Silva to sit down. Luke remained standing (Tr. 22-26, 29-30, 35, 40, 43, 47; Exh. R-B). Eventually the boy was belted in.

Mr. Silva had reason to talk to the Gintz family again during descent. Luke had in the meantime switched seats with the Gintz' oldest child, John (Tr. 232), and was now one row forward in seat 17F, to his father's right. As the aircraft entered its final approach, Mr. Silva noticed that Luke did not have his seat belt fastened. The boy was standing in front of the seat. According to both Mr. Silva and Ms. Nevinski (the aft galley flight attendant), the "Fasten Seat Belt" sign was lit. An announcement instructing passengers to fasten their seat belts had been made. Mr. Silva told Mr. Gintz to secure the child. Mr. Gintz, according to the flight attendant, failed to respond. Mr. Silva continued his final cabin check. Mr. Gintz at some point evidently was able to secure the child, but only momentarily; the boy soon became unbuckled and then lay on the floor in front of his seat. Silva again reminded Mr. Gintz that safety required that the toddler be secured. The flight attendant also told Mr. Gintz that he was failing to comply with the instructions of a crew member. Landing now being imminent, Mr. Silva, in accordance

² Tr. 164, 233. Children under the age of two are not required to be secured in a seat belt when the seat-belt sign is illuminated. 14 CFR §311; Tr. 37, 57.

with safety procedures, took his jump seat in the rear. Luke now was standing on the seat (Tr. 30-33, 54, 63-66).

Immediately after the plane landed and while it was taxiing to the gate, Mr. Silva again approached Mr. Gintz to inform him that the child needed to be seated until the aircraft was parked and the seat-belt sign turned off. "If you want him in the seat, then you put him in the seat," Mr. Gintz responded, according to Mr. Silva (Tr. 33). At this point Silva told Mr. Gintz that he would make an "incident report" concerning Mr. Gintz' failure to follow the crew's instruction. Silva requested identification. Mr. Gintz refused (Tr. 33-34). Silva then took steps to have authorities meet the aircraft (Tr. 34).

The testimony of the Respondents at some points was at variance with Mr. Silva's. Mr. Gintz initially testified that he complied throughout the flight with flight attendants' instructions regarding seat belts (Tr. 168, 174). However, both he and Mrs. Gintz acknowledged that their son Luke was not always belted in during periods in which the boy was required to be.

Mr. and Mrs. Gintz both stated that Luke became unbuckled during ascent. William Gintz admitted that at some point while retrieving his DVD player from the seat in front of him, Luke "must have removed his seat belt" (Tr. 171). Corrine Gintz acknowledged that during climb-out, and while the "Fasten Seat Belt" sign was illuminated, Luke had quickly "popped up" (Tr. 234, 235) and had stood on his seat (Tr. 241).

William Gintz also conceded that Luke was not secured while the aircraft was taxiing to the gate following landing, during which time the "Fasten Seat Belt" sign was lit. He acknowledged "struggling" with his son to re-secure him (Tr. 210). Mrs. Winter, one of the passengers who appeared in support of the Respondents, added that "at times the child [Luke] would wrestle free of the seat belt" (Tr. 261).

Finally, Mr. Gintz denied intimidating Mr. Silva, the flight attendant (Tr. 169, 171-72, 202). Mrs. Gintz supported that testimony (Tr. 237). Mr. Gintz also denied saying, "if you want him in a seat belt, you put him in a seat belt" (Tr. 206). He said that he told Silva during that conversation that the flight attendant was scaring his children and to please leave the family alone. He acknowledged refusing Silva's request for identification (Tr. 176).

B. Determination

I have determined in Docket No. CP06GL0010 that Respondent William Gintz violated FAR §§121.317(k) and 121.580 as charged, and, in Docket No. CP06GL0011, that Respondent Corrine Gintz violated §121.317(k) as charged.

I have credited the testimony of the flight attendants, Mr. Silva and Ms. Nevinski. Their testimony was worthy of belief. I also in the main believe the testimony of Mr. and Mrs. Gintz, as well as the testimony of the nearby passengers Mr. and Mrs. Winter.

Respondents and their witnesses were largely believable, but they sometimes cast the actions of Mr. and Mrs. Gintz in an unjustifiably favorable light. When the testimony of percipient witnesses was in conflict, I gave credence to the testimony of the flight attendants.

Each Respondent, I find, violated §121.317(k). As discussed in the preceding section, the evidence showed clearly that the Gintz' two-and-half-year-old son, Luke, failed to be secured in a seat belt on three separate occasions when instructed by the crew to be belted in and when the "Fasten Seat Belt" sign was illuminated. All witnesses who directly observed Luke, including both Respondents, testified to this. More specifically, the evidence showed that Luke squirmed out of his seat belt during takeoff, when the boy was seated next to his mother, and a second and third time during descent and during taxiing to the gate after landing, when he was seated next to his father.

The Respondents, as the boy's parents accompanying him on this flight, were responsible for ensuring his compliance with the seat-belt regulations. Luke's mother, Mrs. Gintz, failed to continually keep him in a seat belt on climb-out, and Luke's father, Mr. Gintz, similarly failed at that time and again during descent and during taxiing to the gate. Respondents thus each stand in violation of §121.317(k).

Respondents offered testimony from themselves and from Mr. and Mrs. Winter suggesting that Mr. Silva, the flight attendant who dealt with the Gintzes, treated them harshly and unfairly. It was Silva who was intimidating, not Mr. Gintz, the Respondents suggest. Even if these observations are well-taken, they are not relevant to the §121.317(k) charges. Nor is it relevant that Luke's parents performed as well as they could: they each in turn struggled to belt in a tired and wriggly toddler, all the while minding two other small children. The safety of the flight, passengers and crew trumps this point.³ It is the fact that Luke Gintz was not belted in when he was supposed to be that is the gravamen of a §121.317(k) violation. That, and no more.

Mr. Gintz, I find, also violated §121.580. He interfered with the duties of flight attendant Silva. Mr. Gintz' conduct went beyond mere noncompliance (Tr. 52-53). Mr. Silva credibly testified that, in responses to the multiple times he instructed this respondent to secure Luke, Mr. Gintz variously ignored him, shot him an angry look, and told the flight attendant to secure the child himself. These inappropriate reactions caused Mr. Silva to be unnecessarily drawn away from his other responsibilities (Tr. 35).

The primary role of flight attendants, as Mr. Livesey and Mr. Silva testified, is the maintenance of aircraft and passenger safety (Tr. 93). Assuring that passengers are complying with seat-belt obligations -- particularly during the critical junctures of takeoff and landing -- is an important part of the crew's responsibilities because of its direct nexus to the safety of flight. Mr. Gintz' behavior caused Mr. Silva to become unduly distracted from these duties as well as from his service responsibilities. It is NOT the responsibility of the flight crew to assist with child care (see Tr. 300).

³ The point is, however, relevant to penalty. See section C. below.

C. Penalty

I have decided to assess a civil penalty of \$350 against Mr. Gintz in Docket No. CP06GL0010 and \$100 against Mrs. Gintz in Docket CP06GL0011. Assessments in these amounts are warranted by Respondents' behavior in context, evaluated in light of the policies sought to be furthered by the FARs.

These amounts also reflect the arguments Respondents have made in mitigation of penalty and the testimony and exhibits concerning Respondents' ability to pay.

Flight attendants, together with the cockpit, are responsible for an orderly flight and one in which potential peril is minimized. What Respondents failed to sufficiently appreciate was the imperative of Mr. Silva's requests. An illuminated "Fasten Seat Belt" sign and concomitant directions from the crew to secure passengers represents a determination that it is simply not safe to be unbelted at that moment. Mr. Silva's return to his jump seat during both takeoff and landing despite his failure to complete his duties (I.D., p. 5) underscores how critical it is to be securely seated at these times. A flight attendant cannot allow an unsecured passenger in view of the risk of hazards such as turbulence. Unsecured individuals (as well as luggage which is not properly stowed) can become missiles during turbulence. To permit or invite this risk plainly is unacceptable and cannot be tolerated.⁴

Respondents' behavior in failing to secure their child during portions of climb-out and landing posed an unreasonable risk to the safety and orderly completion of the flight, as well as to the safety of their child.

Mr. Gintz defended his actions generally as attending to his responsibility as a parent. He stated that he, and his wife, "controlled [Luke] as best we could" (Tr. 168). Descent, he noted, occurred close to midnight, resulting in a very tired and confused young child (Tr. 173-74; Exh. R-B). Respondents themselves were tired also. Corrine Gintz said that her husband was "exhausted" (Tr. 240). Mr. Gintz noted that he was trying to keep his child occupied. Mrs. Gintz stressed that she was preoccupied with the infant asleep in her lap. Mr. Gintz concluded that he did the best he could "at all times as a parent" (Tr. 168, 203).

Respondents' fatigue, and the trying, often frustrating situation of attempting to control three small children at a late hour, contributed to their resultant behavior, to be sure. I have noted these circumstances in my determination of an appropriate civil penalty. I must stress, however, that these factors fail to absolve the §121.317 violation. They do not excuse the fact of an unbelted passenger for whom Respondents were

⁴ Such concerns are not theoretical, but very real. Over the five-year period 1996-2000, the FAA reported an average of 18 "serious" injuries per year on account of turbulence. *Aviation Safety: Fiscal Year 2008 Business Plan*, p. 9 (found at www.faa.gov).

Indeed, earlier this month, according to an Associated Press story filed January 10, 2008, an Air Canada jet was forced to make an emergency landing in Calgary, Alberta, after an incident of turbulence. "I was in the front seat of the plane," one passenger said, "and was watching dishes fly through the air." Ten people on the flight were hospitalized on account of injuries.

responsible. And while the situation may explain Mr. Gintz' conduct, it cannot absolve it. As the Administrator has recently noted, "it is imperative that airline passengers refrain from interfering with the crew's responsibilities . . . regardless of their personal circumstances. The authority of the crew must be fully respected." *Shelley Louise Conger*, FAA Order No. 2007-8 (August 2, 2007), p. 21-22.

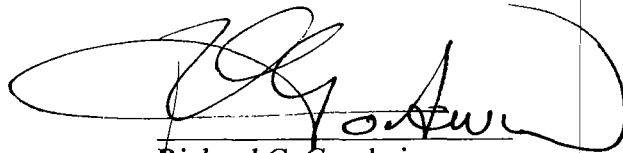
Mr. Gintz also testified that the effect of \$4,000 total civil penalty for him and his wife would be "devastating" (Tr. 190). He offered relevant records in support.⁵ The records demonstrate that Respondents' financial situation is challenging. I have accounted for this factor as well in my penalty determination.

The totality of these circumstances, I conclude, warrants a civil penalty of \$350 against Mr. Gintz and \$100 against Mrs. Gintz. It reflects the nature and result of Respondents' transgressions as well as the mitigating factors and the affirmative defense of financial difficulty discussed above.

I recognize that the amount of the civil penalty is substantial in light of the Respondents' testimony concerning their financial circumstances. The civil penalty is intended to be substantial. The assessment should have "bite" – it should have both punitive and deterrent value. Flight attendants in an operating aircraft must be permitted to focus on and exercise their duties without significant interruption. Respondents' actions unacceptably risked the safety of the flight and its orderly completion. In these cases, I find and conclude that the penalty will promote respect for proper conduct aboard aircraft and for the safety responsibilities associated with air transport.

On the basis of the foregoing, in FAA Docket No. CP06GL0010 I hereby assess a civil penalty of \$350 against Respondent William Gintz for violations of 14 C.F.R. §§121.317(k) and 121.580, and, in FAA Docket No. CP06GL0011, a civil penalty of \$100 against Respondent Corrine Gintz for a violation of §121.317(k).⁶

SO ORDERED.



Richard C. Goodwin
U.S. Administrative Law Judge

Attachment(s) – Service List

⁵ Exhs. R-D-1 and R-D-2. An Order accompanying this Initial Decision seals those records in accordance with my ruling at the hearing. See Tr. 194, 201.

⁶ In view of this Initial Decision, Respondent's motion to dismiss and/or for a directed verdict is denied. Any appeal from this order to the Administrator must be in accordance with section 13.233 of the Rules of Practice, which requires 1) that a notice of appeal be filed no later than 10 days (plus 5 for mailing) from the date of this order and 2) that the appeal be perfected with a written brief or memorandum not later than 50 days (plus 5 for mailing) from the date of this order. Each is to be sent to FAA counsel and particularly to the **Federal Aviation Administration, 800 Independence Avenue, S.W. Washington, DC 20591, Attention: Appellate Docket Clerk, AGC-430, Wilbur Wright Building – Room 2014.**

FAA Docket Nos. CP06GL0010
& CP06GL0011
(Civil Penalty Action)

SERVICE LIST

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¹ Service was by U.S. Mail. For service in person or by expedited courier, use the following address: Federal Aviation Administration, 600 Independence Avenue, S.W., Wilbur Wright Building—Suite 2W1000, Washington, DC 20591; Attention: Hearing Docket Clerk, AGC-430.